U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: APR 19 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

Identifying... prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires my be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The order dismissing the appeal will be withdrawn and the appeal will be sustained.

The applicant is a native and citizen of India who was admitted to the United States as a nonimmigrant visitor on April 10, 1988, with authorization to remain until October 29, 1988. An Order to Show Cause (Notice to Appear) was issued in his behalf on April 27, 1990 at a Santa Ana, California address, charging him with remaining longer than authorized. A bond posted in his behalf was breached when he failed to appear for a hearing and he was ordered deported in absentia on September 28, 1990. The applicant has failed to depart. Therefore, he is inadmissible under § 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii).

The applicant is the derivative beneficiary of a 4th preference family-based visa petition. The applicant's wife and 12 year old son are also beneficiaries. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), so that his son can continue receiving medical treatment.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel elaborates on the medical condition of the applicant's son has a medical condition and provides documentation to demonstrate that it is unique and novel. The applicant's son was born with a rare disease called Usher's Syndrome, which causes deafness and progressive loss of vision in adulthood. Counsel has provided testimony to show that the applicant never intended to disobey a court order, but the applicant's devotion to his son was the primary concern and he failed to properly attend to his immigration status. Counsel states that the Service failed to consider evidence of extreme hardship to the family arising from the child's medical history, failed to consider evidence of his community involvement and civic activities, failed to consider the hardship arising from the applicant and his wife possessing different nationalities, and failed to consider the likelihood of forced family separation.

Section 212(a)(9)(A) of the Act provides that:

> (ii) Any alien not described in clause (i) who-
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> (I) has been ordered removed under § 240 of the Act or any other provision of law, or
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> (II) who departed the United States while an order of removal was outstanding,
>
> and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of

[redacted]

> such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
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> (iii) EXCEPTION.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former §§ 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former § 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, Interim Decision 3289 (BIA 1996), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Prior to 1981, an alien who was arrested and deported from the United States was perpetually barred. In 1981 Congress amended former § 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17), eliminated the perpetual debarment and substituted a waiting period. Congress has now increased that waiting period by means of the IIRIRA amendments.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal, recency of removal, length of residence in the United States, moral character of the applicant, the alien's respect for

law and order, evidence of reformation and rehabilitation, the existence of family responsibilities within the United States, any inadmissibility to the United States under other sections of the law, hardship involved to the alien and to others, and the need for the applicant's services in the United States. Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Matter of Lee, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

In Matter of Tin, supra, the Regional Commissioner held that such an unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following Tin, supra, an equity gained while in an unlawful status can be given only minimal weight.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered.

The applicant's son has been undergoing treatment for congenital deafness since 1990. He received a nucleus 22 cochlear implant in October 1992. At the time of the implant, [redacted] could not speak. Based on a February 25, 1998, from the Director, Division of Audiology, University of Illinois College of Medicine, [redacted] has intelligible speech, communicates orally, and is enrolled in a hard-of-hearing classroom where the teacher and children only speak (no sign language at all). The report indicates that [redacted] schooling has been coordinated with his therapy which requires constant monitoring and will take many years. The report indicates that [redacted] implant must be checked every six months, he must continue his bi-weekly speech and auditory therapy, he needs to be monitored by an eye specialist, and the initial surgery was performed contingent on the fact that the follow-up would be performed in the United States and such follow-up is for a lifetime in order to avoid blindness and deafness. The record reflects that the applicant's son was the first child at the University of Illinois Hospital to undergo such implant surgery in October 1991.

The record also reflects that the applicant filed an Application for Status as Temporary Resident (Form I-687) in Los Angeles supported by fraudulent residence and employment documents

while actually residing in the New Jersey/New York area. He stated under oath on April 26, 1990, that he did it for his son, who was hearing impaired and was in India at that time. Of course the record reflects that the applicant's son was actually in the United States at the time the applicant gave the sworn statement to a Service officer in Los Angeles, California. The applicant was granted employment authorization in April 1990, based on that application, which was valid for one year.

The favorable factors in this matter are the applicant's family tie (a U.S. citizen child), the absence of a criminal record, the need for the applicant's presence to provide for the family, the approved preference visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's failure to appear for the removal hearing, his failure to depart, his employment without Service authorization, his gaining equities while under deportation proceedings, his fraudulent legalization application, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, supra, that he could only relate a positive factor of residence in the United States where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law, would seriously threaten the structure of all laws pertaining to immigration.

Although the applicant's actions in this matter cannot be condoned, the humanitarian aspects of the matter regarding the applicant's son, the son's critical medical condition, the son's required medical monitoring and observation and the absence of such medical treatment in the applicant's native country must be favorably considered. It is concluded that the applicant has now established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); and Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has now established that he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the order dismissing the appeal will be withdrawn. The director's decision will withdrawn and the application will be approved.

ORDER: The order of June 8, 1999 dismissing the appeal is withdrawn. The director's decision is withdrawn and the application is approved.